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Supreme Court of the United States

OCTOBER TERM, 1979 79-2046

No.

JAMES DAZET,

Petitioner

VERSUS

STATE OF LOUISIANA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

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Petitioner prays that a Writ of Certiorari issue to review the Judgment of the Supreme Court of Louisiana, entered December 13, 1979, rehearing denied January 28, 1980.

CITATION TO OPINION BELOW

The opinion of the Supreme Court of Louisiana in ***State of Louisiana v. Dazet***, is reported at 378 So. 2d 1369 (La., 1980), and is set out in *Appendix B*, attached hereto.

JURISDICTION

The judgment of the Supreme Court of Louisiana was entered on December 13, 1979, and a timely Petition for Rehearing was denied on January 28, 1980. Petitioner sought and obtained from this Honorable Court an Order extending the time to file a Petition for Writ of Certiorari to and including June 26, 1980. (See *Appendix C*).

Jurisdiction of this Court is invoked under 28 U.S.C., Section 1257 (3), Petitioner having asserted below and he asserts in this Court deprivation of rights secured by the Constitution of the United States of America.

QUESTIONS PRESENTED

1. Whether probable cause, as contemplated by the Fourth Amendment to the United States Constitution, existed for the issuance of a warrant authorizing the search of an apartment occupied by Petitioner, when the pertinent facts given in the Affidavit in support of that warrant came from an unidentified "confidential informant," with no past history of reliability shown and with no independent corroboration of his allegations and containing allegations of material fact shown to be false.

2. Whether rights protected by the Fourth Amendment to the United States Constitution were violated by Law Enforcement Officers when they apparently embarked upon a search of each apartment within a three-apartment structure until suspected contraband was found in Petitioner's apartment.

3. Whether the failure of Affiant Law Enforcement Officers to disclose to the Magistrate pertinent facts concerning police activity in prior searches of apartments in the buildings in which Petitioner's apartment was located and the totally false factual conclusion reached by the Louisiana Supreme Court to the effect that these facts *were* presented in the Affidavit violated Petitioner's rights as protected by the Fourth Amendment to the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following Amendments to the Constitution of the United States:

Amendment IV

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated and no warrants shall issue, but upon probable cause, supported by Oath or Affirmation, and particularly describing the place to be searched and the persons or things to be seized."

Amendment XIV, Section 1

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

This case also involves the following provisions of the Constitution of the State of Louisiana of 1974:

Article 1, Section 2

DUE PROCESS OF LAW

> "No person shall be deprived of life, liberty, or property, except by due process of law."

Article 1, Section 5

RIGHT TO PRIVACY

"Every person shall be secure in his person, property, communications, houses, papers, and effects against unreasonable searches, seizures or invasions of privacy. No Warrants shall issue without probable cause supported by Oath or Affirmation, and particularly describing the place to be searched, the persons or things to be seized, and the lawful purpose or reason for the search. Any person adversely affected by a search or seizure conducted in violation of this section shall have standing to raise its illegality in the appropriate Court."

STATEMENT OF THE CASE

This is a Petition for Writ of Certiorari to review the Judgment of the Supreme Court of Louisiana, entered December 13, 1979, timely rehearing denied January 28, 1980, affirming the conviction of Petitioner, JAMES DAZET, and refusing to overrule the decision of the Trial Court denying Petitioner's Motion to Suppress Evidence.

On April 1, 1977, narcotics agents of the Jefferson Parish Sheriff's Department made use of an individual named "Torres" for the purpose of attempting to purchase narcotics. These agents sent Torres on his errand in the evening hours and following him to a building located at 1525 Aztec Street in Metairie, Louisiana. There was no indication in the record or in the Affidavit given for the subsequently issued Search Warrant that Torres' vehicle or that Torres' person was searched either before he was dispatched or after he returned. Transcript, Page 43. The building to which he travelled contained three (3) separate residences or apartments, and the agents watching Torres did not know which apartment he entered or which residents he met. (Transcript of Testimony, Pages 13, 15,). No indications appear in the record or in the Affidavit that "Torres" had any previous history of reliability or trustworthiness.

When Torres later met with the narcotics agents, he sold

them one-quarter ounce of cocaine. (Transcript Pages 43). Torres was not searched at any time nor was his vehicle examined. The agent admitted that they had no evidence whatsoever as to the residence from which the contraband came or the persons who supplied it. Nevertheless, agents sought a Warrant for the search of Apartment "C" at 1525 Aztec Street wherein resided a "Tom Lee". During the Motion to Suppress Hearing, agents revealed that they selected Lee's apartment for a search because they had "information" that Lee was "dealing in some cocaine". Transcript of Testimony, 20). The source of that information was not revealed during the Hearing and neither its existence nor its source is described in the Affidavit given in support of the Search Warrant. (Transcript, Pages 40 and 43).

A search of Lee's apartment on the basis of the first Warrant issued produced marijuana. Lee was charged with possession of marijuana as a result of the search and he was questioned. He was told that if he supplied information to arresting officers, his wife would not be arrested. (Transcript of Testimony, 20 and 21).

The day following the events described above, the same Jefferson Parish Narcotics Agents who had arrested Tom Lee sought a second Search Warrant for Apartment "A" at 1525 Aztec Street. In the Affidavit given to the issuing Judge, the Honorable Patrick Carr, these agents made the following statements:

1) On April 1, 1977, undercover agents met with Frank Torres who informed them that a friend was in possession of "a large quantity of cocaine and marijuana and that he could sell Agent Grannan any amount that he wanted". (No information is provided in that Affidavit as to Torres' previous history of reliability or as to the source of his alleged knowledge).

2) Agent Grannan made arrangements to meet with Torres in a parking lot somewhat distant from the building in which is located the apartment which was ultimately searched. Grannan supplied Torres with certain marked money. (No search was conducted of Torres or of his vehicle).

3) On April 1, 1977, Torres was followed while driving his automobile from the parking lot to 1525 Aztec Street where he exited his vehicle and entered the building.

4) Within twenty minutes of his entrance into the 1525 Aztec Street building, Torres exited the structure, entered his vehicle and was followed to a stopping place at which Torres sold to an undercover agent one quarter ounce of cocaine. (Again, no search of Torres or his vehicle was conducted. In addition, there is no statement or information indicating that the cocaine came from 1525 Aztec Street or any residence located therein).

5) Narcotics agents began an investigation of the activity of the occupant of 1525 Aztec Street, Apartment "A". Apparently by checking with a "confidential source" (whose identity, past history of reliability and/or reputation and/or source of information is not revealed), they concluded that:

(a) The apartment " . . is occupied by Dorothy Gardner w/f; " (in fact, the apartment proved not to be occupied by such an individual).

(b) The apartment is "frequently additionally occupied by a subject by the name of James Dazet".

(c) The apartment's principal occupant, Dorothy Gardner, had no police record, but James Dazet did have a police record.

All of the foregoing items were attributed to an unidentified

"confidential source".

6) On April 2, 1977, one narcotics agent was advised by another narcotics agent that a "reliable confidential informant" (with no history of previous reliability) had stated that:

(a) On numerous occasions while inside Apartment "A" of 1525 Aztec Street, he had observed" . . . large amounts of marijuana and cocaine inside the apartment" (all of which was denied under oath).

(b) His most recent visit to the apartment was on the evening of April 1, 1977; (no mention of an observation of contraband appears).

(c) On several occasions he had purchased drugs from James Dazet" . . . in that apartment". (All of which was denied under oath).

(d) The informant did not wish to purchase any drugs from Dazet for evidence.

7) Information belonging to the alleged informant ". . . has been proven reliable through independent investigation." (The nature of such information and/or of the independent investigation is not disclosed.) (Transcript, Pages 40 and 43).

The Affidavit described above did not contain, among other essentials, the following:

1) Any declaration that the "Confidential Informant" had been proven reliable in the past. (Transcript, Page 40). (Indeed, it was disclosed at the Hearing on the Motion to Suppress that the informant, admitted to be Tom Lee, had never supplied any information to the agents before the evening of his arrest. (Transcript of Testimony, Page 31);

2) Any statement whatsoever that the Confidental Informant had seen contraband in Apartment "A" on the occasion of his alleged last visit, that is, April 1, 1977;

3) Any disclosure whatsoever as to the last time contraband was observed in that apartment. (Transcript, page 40);

4) Any clear statement that "information" possessed by the informant was corroborated through investigation by the agents giving the Affidavit or conducting the investigation in question or that the "information" pertained in any way to the matter presently under investigation;

5) Any information whatsoever to establish the previous history of reliability of the informant and the accuracy and reliability of the information provided by the "Confidential Source" referred to in the first full paragraph of Page 2 of the Affidavit. (Transcript, Page 40).

6) Any facts supporting the previous history of reliability and reputation and/or accuracy of statements and actions of "Frank Torres" referred to in the first page of the Affidavit. (Transcript, Page 43);

7) Any facts or information revealing agents' attempts to be certain that any contraband sold to them by Torres, in fact came from 1525 Aztec Street, rather from Torres himself, his vehicle, or some other source.

In fact, during a Hearing on the Motion to Suppress Evidence, it was revealed that the Affiant's statement that "information" of their "reliable Confidential Informant" had been "proven reliable through independent investigation" could not have referred to any verification ***before*** the search of Apartment "A". The agents had no independent information whatsoever about Apartment "A" or its contents until they

actually conducted a search of that apartment in connection with the warrant which is the subject of this Appeal, except the statements made to them by the informant, Tom Lee, the night prior to the ultimate search. (Transcript, Page 40; Transcript of Testimony, Pages 26, 27, 29, 30, 31).

In the course of the Hearing on the Motion to Suppress Evidence, it was revealed that the Confidential Informant referred to in the Affidavit given in support of the Search Warrant was the Tom Lee whose first contact with the police had been in the course of his arrest on April 1, 1977. (Transcript of Testimony, Pages 29 and 30). Agent Nelson. who signed the Affidavit for the Search Warrant admitted that he "didn't know" if the alleged "Confidential Informant" had any history of reliability, and the subsequent testimony of Agent Nelson and the Affidavit itself reveals that, in fact, he had no such previous history. (Transcript of Testimony, Pages 8 and 9).

At the time of the original surveillance of the apartment building in question, all officers were aware that it contained more than one residence and that, in fact, it contained three (3) apartments. (Transcript of Testimony, Page 13). Despite that knowledge, in the Affidavit given in support of the Search Warrant, in his discussion of the visit by Frank Torres to 1525 Aztec Street in Metairie, the Affiant fails to indicate that the address contains more than one apartment, although that fact does appear elsewhere in the Affidavit. (Transcript, Page 43).

It was further revealed during the Hearing on the Motion to Suppress Evidence that Apartment "A" of 1525 Aztec Street in Metairie, which was the subject of the search now being challenged, was rented to a woman whose name was Dorothy "Gardner" or "Garner". and was being occupied by a Dorothy Urquahart. (Transcript of Testimony, Pages 23 and 24).

During the Hearing on the Motion to Suppress Evidence,

the District Attorney attempted to elicit from the narcotics agents a description of the specific "information" possessed by the "Confidential Informant" which, in his Affidavit, the agent had described as having been verified to be accurate. Despite the District Attorney's intensive efforts to accomplish this, it became evident that the only "verification" that occurred was *after* the search of the apartment was conducted. The specific information which the agent mentioned during the questioning was (1) where Mr. Dazet lived (which was not specified in the Affidavit); (2) the description of Apartment "A"; (3) a supposed description of narcotics in Apartment "A"; (4) the fact that a woman was living in Apartment "A" (Transcript of Testimony, Page 27). The District Attorney attempted to elicit from the agent a statement concerning the informant's knowledge of "who is buying and who is selling narcotics in Jefferson Parish" (none of which is contained in the Affidavit), but the agent admitted that that information was never verified as being correct or truthful. (Transcript of Testimony, Pages 28 and 29).

The evidence presented at the Hearing on the Motion to Suppress Evidence revealed that essential statements by the Affiants on the Affidavit given in support of the Search Warrant were false and inaccurate. That evidence came in the form of sworn testimony by the admitted "Confidential Informant", Thomas C. Lee. He confirmed that police officers conducted the search of his apartment on April 1, 1977, found marijuana and charged him with possession of marijuana. He also confirmed that the police officers, after his arrest, questioned him and promised not to arrest and charge his wife with a crime if he would answer his questions. In addition, he clearly established the previously admitted fact that he had never furnished any information at all for narcotics officers in the past. (Transcript of Testimony, Pages 30 and 31).

The informant, Lee, directly contradicted statements made by Agent Nelson and Agent Renton in the following respects:

1) He denied ever having told Agent Renton that he had seen "large amounts of marijuana and cocaine in Apartment "A" at 1525 Aztec Street on numerous occasions". (Transcript of Testimony, Page 31).

2. He denied ever having told Agent Renton that he had " . . . on several occasions . . ." purchased drugs from" . . . James Dazet at Apartment "A" at 1525 Aztec Street." (Transcript of Testimony, Page 31).

Lee additionally denied having in any way ever been threatened by Mr. Dazet. (Transcript of Testimony, Pages 31 and 32).

Lee confirmed that after the search of his apartment and after his arrest for possession of marijuana, he was told by arresting agents that they would agree not to arrest and charge his wife with a crime if he would answer their questions and provide "information " about "other persons". (Transcript of Testimony, Page 32). Under intensive examination by the District Attorney, Lee continued to maintain that he did not tell Agent Renton that he had purchased any drugs from James Dazet (Transcript of Testimony, Page 34). and that he did not tell Agent Renton about any "other people". (Transcript of Testimony, Page 34).

Following the Hearing on the Motion to Suppress Evidence, the Court denied that Motion. Subsequently, Petitioner JAMES DAZET, entered a plea of "guilty" to one count of possession with intent to distribute cocaine, with reservation of his right to appeal the Court's ruling on the Motion to Suppress Evidence. Petitioner was sentenced to imprisonment for a period of FIVE (5) YEARS.

FEDERAL QUESTIONS RAISED AND DECIDED BELOW

I.

In the Courts below, Petitioner challenged the existence of probable cause as contemplated by the Fourth Amendment to the United States Constitution justifying the issuance of a Search Warrant of his apartment when the pertinent facts presented in the Affidavit in support of that warrant came from an unidentified "Confidential Informant" with no past history of reliability demonstrated and with no independent corroboration of that informant's allegations and containing allegations of material fact shown to be false.

II.

In the Courts below, Petitioner argued and asserted that his rights as protected by the Fourth Amendment to the United States Constitution were violated by Law Enforcement Officers when they apparently embarked upon a search of each apartment within a three-apartment structure until suspected contraband was found in Petitioner's apartment.

III.

In the Courts below, Petitioner contended that the failure of Affiant Law Enforcement Officers to disclose to the issuing Magistrate pertinent facts concerning police activity in prior searches of apartments within the building in which Petitioner's apartment was located and further the totally false and inaccurate factual conclusion reached by the Louisiana Supreme Court to the effect that these facts *were* presented in the Affidavit violated Petitioner's Fourth Amendment rights.

ARGUMENT AND REASONS FOR GRANTING THE WRIT

1. This Court should grant Certiorari to consider whether probable cause, as contemplated by the Fourth Amendment to the United States Constitution, existed for the issuance of a warrant authorizing the search of an apartment occupied by Petitioner when the pertinent facts given in the Affidavit in support of that warrant came from an unidentified "confidential informant" with no past history of reliability demonstrated and with no independent corroboration of the informant's allegations and containing allegations of material fact shown to be false.

It is fundamental to the laws of the United States of America that no Search Warrant may issue without probable cause. Probable cause exists when the facts and circumstances within the Affiant's knowledge, and of which he has reasonably trustworthy information, are sufficient to support a reasonable belief that an offense has been committed and that the evidence or contraband may be found at the place to be searched. ***State v. Turnip Seed,*** 362 So. 2d 486 (La., 1978); ***State v. Richards,*** 357 So. 2d 1128 (La., 1978).

When information contained within a warrant application is based upon hearsay, the underlying information supporting the credibility of the informant ***and*** the reliability of the information must also be alleged. ***Spinelli v. United States,*** 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969); ***Aguilar v. Texas,*** 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964).

In the light of the requirements for probable cause and for the inclusion of hearsay information in an Affidavit given in support of a Search Warrant, it is submitted to this Court that the Affidavit given for the warrant under attack in the instant case is insufficient on its face. The Affidavit is lacking because

it failed to establish the reliability of the informant and because a substantial factual basis for the informant's report is not provided.

Initially, it should be noted that although the Affidavit given in support of the Search Warrant (appearing at Pages 43 and 40, in that order, of the Transcript) is lengthy, no information whatsoever concerning the residence which was the subject of the search appears prior to the last three paragraphs on the second page. All information appearing on the entire first page and at the beginning of the second page of the Affidavit appears to be quite unrelated to Apartment "A" which was the subject of the search. (Transcript, Pages 43 and 40). The only information pertaining to Apartment "A" of 1525 Aztec Street, which was the subject of the Search Warrant, appeared in the first and second full paragraph on Page 2 of the Affidavit (Transcript, Page 40) and for the most part, was allegedly obtained by a narcotics agent, "Renton", from a "Confidential Informant".

It is essential in determining the credibility of an unidentified informant that the Magistrate be advised either of prior accurate reports or of specific ***independent*** corroboration of the accuracy of the instant report. See ***State v. Paciera***, 290 S.2d 681 (La. 1974). Thus, the Magistrate must have sufficient facts to independently evaluate the reliability of the informant and of his information. Let us now examine the Affidavit in the case before this Court in order to determine whether the issuing Magistrate was presented with facts sufficient to enable him to ***independently*** evaluate the reliability of the informant.

The only reference to the reputation of the Confidential Informant appears in the second full paragraph on Page 2 of the Affidavit appearing at Transcript, Page 40. The Affiant, Agent Nelson, states that he ". . . learned that he, Renton,

had a reliable Confidential Informant whose information has proven reliable through independent investigation . . ." It is apparent that there is no statement appearing in that paragraph or anywhere else in the Affidavit which indicates that the "Confidential Informant" had given information in the past which was accurate.The bald assertion that "information" (the nature, quantity, importance or results of which is not disclosed) has "been proven reliable" is simply not sufficient for a reasonable independent and neutral Magistrate to conclude that the the informant is reliable. This glaring flaw becomes even more obvious when the testimony of the narcotics agent given at the Hearing on the Motion to Suppress is examined. The following significant testimony from Agent Renton appears at Page 19 of the Transcript of Testimony:

Q. Had you ever used Mr. Lee as an informant at any time before that?

A. Before what.

Q. Before the evening of April 1?

A. No, I hadn't.

Q. Did anybody else who was working on this case ever use him?

A. Not to my knowledge.

And further, the testimony of the Confidential Informant himself, Thomas Lee, as it appears at Page 31 of the Transcript of Testimony, confirms no prior history of reliability had been established:

Q. Had you ever furnished information for him (Agent Renton) as an informant in the past? (Parantheses Added)

A. No.

In the case at bar, the Affidavit contained no facts or circumstances whatsoever showing that the information from the informant was proven reliable from "independent investigation", but the subsequent Hearing showed that absolutely no "independent investigation" whatsoever was conducted, except to attempt to determine the residents of Apartment "A" and the record, if any, of Petitioner, JAMES DAZET. It is vital to remember at this point that police officers had no reliahle information that Petitioner was even in the apartment and they were dealing with a "Dorothy Gardner" as the actual occupant of the apartment, and she had no police record whatsoever.

Law Enforcement Officers giving the Affidavit in support of the Search Warrant in question apparently attempted to establish an aura of credibility for the informant with the statement in the Affidavit (Transcript, Page 40) that Agent Renton had an informant ". . . whose information has been proven reliable through independent investigation. . ." It is apparent that this was a ruse. There certainly appears no specific evidence which a neutral Magistrate could have examined and evaluated with independence for the purpose of determining whether the informant was so trustworthy as to justify an invasion of the sanctity of a citizen's home to conduct a search.

At the Hearing on the Motion to Suppress Evidence, the State attempted to apply, by testimony, evidence of the reliability of the informant. At the outset, it must be pointed out that the Court cannot consider in its determination as to whether a Magistrate had before him a reliable informant, information ***subsequently*** introduced at a Hearing on the Motion to Suppress Evidence. See ***Scone v. Powell***, 428 U.S. 465, 473, n. 3, 96 S. Ct. 3037, 3042, 49 L. Ed. 2d 1067 (1976);

Whiteley v. Warden, 401 U.S. 460, 91 S.Ct. 1031, 28 L. Ed. 2d 306 (1971).

Nevertheless, the repeated attempts of the District Attorney to accomplish precisely that which has been forbidden by this Court, served merely to highlight the total lack of previously established reliability on the part of the informant. At the Hearing on the Motion to Suppress, the only specific information which the State's witness claims to have obtained was: (1) Where Mr. Dazet lived; (2) The description of Apartment "A" (not specified in the Affidavit); (3) A supposed description of narcotics in Apartment "A" (also not disclosed in the Affidavit; (4) The fact that a woman was living in Apartment "A". (Transcript of Testimony, Page 27). None of this "information" was explained with specificity. In a final desperate attempt to show, outside of the Affidavit, that the Confidential Informant had some history of reliability, the District Attorney asked the informant on the witness stand whether, prior to the issuance of the warrant, he had given information to Agent Renton concerning narcotics in Jefferson Parish. (None of this appears in the Affidavit). The witness responded to that appears in the Affidavit). The witness responded to that question by admitting that whatever information may have been supplied by the informant, it was never verified as having been correct or truthful. (Transcript of Testimony, Pages 28 and 29).

Although this Court had, in certain instances, permitted the tip of an informer who has not established a history of reliability to serve as a partial basis for the issuance of a Search Warrant, it has required that there be ***specific*** independent corroboration of the accuracy of his ***instant*** report. This Court in making such a determination has emphasized that, ". . .the additional information required by the arresting officers must in some sense be corroborative of the informer's tip that the arrestees committed the felony or, as in ***Draper***, itself, were in the process of committing a felony." ***Whiteley v. Warden, Supra***, 401 U.S. at Page 566. In the case at bar, there was

simply no corroboration of an independent nature whatsoever of the information allegedly given by the informant. Repeated readings of the Affidavit appearing at Pages 43 and 40 of the Transcript reveal that the information allegedly supplied by the informant concerning the presence of contraband in the apartment in question was, in no way verified or "checked out" by narcotic agents themselves. It is obvious that, had the agents wished to properly shore up the "tip" received from this shadowy informant, they could have established a surveillance of Apartment "A" and determined who entered and who left the premises over a period of time. They could have, as they frequently have in the past, sent into that specific apartment an undercover agent or other informant with the mission of attempting a "buy" therein.

None of these tactics were employed. Instead, Agent Renton proceeded to the Magistrate with a lengthy two page Affidavit containing statements about persons and events unrelated to Apartment"A" at 1525 Aztec Street and further containing uncorroborated allegations of the presence of contraband in Apartment "A" emanating from an unidentified source with no past history of reliability and no independent verification of the report of that informant contained in the Affidavit. Such a document is wholly insufficient to support the issuance of a Search Warrant under the Constitutions of the United States of America and of the State of Louisiana.

Even if the information allegedly supplied by the Confidential Informant is taken as true for the sake of argument only (which Petitioner strenously asserts is not the case), it was insufficient to establish probable cause that contraband was on the premises to be searched on April 2, 1977. The narcotics agents claimed, in their Affidavit, that their informant (Whose identity as Thomas Lee was disclosed at the Hearing on the Motion to Suppress Evidence) had stated that he had on "numerous occasions" observed "large amounts of marijuana and

cocaine" in Apartment "A". The dates of those alleged observations do not appear anywhere in the Affidavit. The only specific date appearing in the Affidavit for a visit to the apartment by the Confidential Informant is the evening of April 1, 1977, but there is no claim made that on that visit the informant saw any contraband. (transcript, Page 40).

Thus, in the case at bar, there is no substantial and clearly articulated independent corroboration of information supplied by the informant. Even the narration of facts concerning the activities of "Frank Torres" in selling a quarter ounce of cocaine to the agents do not in any way corroborate the alleged allegations of the informant . First, they fail in this respect because the activities of 'Frank Torres" occurred before the statements allegedly made by the informant and second, they fail because they are not shown in any way to be directed to Apartment "A" of 1525 Aztec Street in Metairie. (Transcript Page 43). Moreover, a reading of the description of these activities as they appear in the Affidavit at Page 43 of the Transcript reveals that no attempt whatsoever was made to determine precisely what the source of any contraband which Torres produced might be. The cocaine which he allegedly sold to the agents could easily have come from his person, having been there before in a visit to 1525 Aztec Street, or from his automobile, or from some other source. The officers did not search Torres nor did they search his automobile either before or after the buy.

A brief reference must be made to other information contained in the first full paragraph on Page 2 of the Affidavit given in support of the Search Warrant in the case at bar. (Transcript, Page 40). That paragraph contains the statement that ". . . after checking with a confidential source (agents) learned that this apartment is occupied by Dorothy Gardner w/f and is frequently occupied by a subject by the name of James Dazet". (Parantheses added). Petitioner contends that the information contained in that paragraph as having come

from a "confidential source" is totally insufficient to support the issuance of a warrant. Additionally, however, that paragraph contains no claim whatsoever to a past history of reliability on the part of the "confidential source" and no statement of independent corroboration of the source's instant report. Thus, in accordance with the principles outlined above, that entire paragraph must be considered as inconsequential in connection with the issuance of the warrant.

The Search Warrant under consideration by this Court must fall, however, because of an even more fundamental flaw. Petitioner proved, beyond any contradiction by the State, that the Affidavit given in support of the warrant contained material misrepresentations. These inaccuracies, even if unintentional, when excised, will render the Affidavit of no value whatsoever in supporting a Search Warrant. Additionally, however, petitioner contends that these misrepresentations or "inaccuracies" could not have been anything but intentional.

The case before this Court is unique in that the "Confidential Informant" has been presented by Petitioner, under Oath, for questioning. The identity of that informant was confirmed during the Hearing on the Motion to Suppress Evidence as Thomas C. Lee. (Transcript of Testimony, page 9 and 10).

The Affiant, narcotics Agent Nelson, who appeared before a Magistrate seeking a warrant for the search of Apartment "A" at 1525 Aztec Street in Metairie, made a number of factual allegations. Some of these pertain to events and facts which he personally observed and some pertained to facts and events allegedly conveyed to him by another agent, "Renton". Some of the facts and events allegedly conveyed to Nelson by Renton were alleged to have been communicated to Renton from the "Confidential Informant" revealed to be Thomas C. Lee.

It is submitted to the Court that a reading of the Affidavit will reveal that nothing contained therein would give rise, even

remotely, to a search of Apartment "A" at 1525 Aztec Street, if that allegedly supplied by the Confidential Informant were excised. Let us now examime what information was claimed to have been given by the Confidential Informant. It can be summarized as follows:

1) On numerous occasions while inside Apartment "A" of 1525 Aztec Street, he had observed ". . . large amounts of marijuana and cocaine inside the apartment."

2) His most recent visit to the apartment was on the evening of April 1, 1977;

3) On several occasions he had purchased drugs from James Dazet " . . . in that apartment".

4) The informant did not wish to purchase any drugs from Dazet for evidence.

Under Oath, Thomas C. Lee repeatedly declared that:

1) He had never told Agent Renton that he had seen "large amounts of marijuana and cocaine in Apartment "A" at 1525 Aztec Street on numerous occasions." Transcript of Testimony, Page 31);

2) He had never told Agent Renton that he had ". . . on several occasions . . ." purchased drugs from ". . . James Dazet at Apartment "A" at 1525 Aztec Street". Transcript of Testimony, Pages 31 and 34);

3) He had never told Agent Renton about any "other people". (Transcript of Testimony, Page 34);

4) He had never furnished any information at all for narcotics officers in the past. (Transcript of Testimony,

Pages 30 and 31).

Petitioner submits to this Court that the sworn testimony of Thomas C. Lee in a Court of Law must be taken as the truth of the matter. This is especially true in view of the inability of the State to provide any corroborative witness for the contention of Agent Renton. (Note that Agent Nelson admitted that he did not recall the "totality" of the conversations between Renton and Lee and that he was "in and out" and was not "totally aware of everything that was said" and therefore had to "rely on what Agent Renton told me"). (Transcript of Testimony, Pages 11 and 12). In view of the sworn testimony of the Confidential Informant before the Court that statements attributed to him in the agent's Affidavit were untrue, Petitioner suggests that no conclusion may be reached other than that the Affidavit contains intentional misrepresentations and the warrant issued thereunder should be quashed.

Alternatively, however, should this Court find that "intentional" misrepresentations did not appear, at the very least, it is apparent that inaccuracies exist. Whether these inaccuracies were the product of difficult communication between the "Confidential Informant", who was under arrest for a crime and whose wife was threatened with arrest (Transcript of Testimony, Pages 20 and 21), we cannot, at this time, determine, but its reliability must be considered, at best, questionable. Nevertheless, that alleged "information" formed the vital underpinning for a blatant search of a private residence.

The Affidavit which was presented to the Magistrate contains "inaccuracies" and is "misleading" not only by what it contains, but, especially, by what it has omitted. The Hearing at the Motion to Suppress Evidence brought to light the following significant facts:

1) The apartment to be searched is not, in fact, occupied by "Dorothy Gardner w/f" as alleged in the Affidavit,

but instead, was occupied by Dorothy Urquahart (Transcript of Testimony, Page 23);

2) Narcotics agents full attention had been focused on Apartment "C" at 1525 Aztec Street and specifically upon its occupant, Thomas C. Lee, who was suspected of dealing cocaine. (Transcript of Testimony, Page 20);

3) Narcotics agents had sought and obtained a search Warrant for Thomas C. Lee's Apartment "C" at 1525 Aztec Street and did not shift their attention to Apartment "A" until they had arrested Thomas Lee, threatened his wife with arrest, and extracted from him certain alleged statements. (Transcript of Testimony, Pages 20 and 21).

None of the information related above was presented to the Magistrate who signed the Search Warrant. Thus, that Magistrate was deprived of facts which certainly would have caused him to question the accuracy of the information allegedly supplied by the "informant" who was in custody. He was further deprived of that information which might well have caused him to question whether the officer seeking the ***second*** warrant for 1525 Aztec Street within a twenty-four hour period had merely embarked on a "fishing" expedition in which he would ultimately search every apartment in the building until something incriminatory were discovered. In short, the glaring failures of the agents soliciting a warrant and the Magistrate attempting to examine the facts in an objective fashion cast a pall over the entire proceedings and demand the suppression of all evidence obtained in connection with that warrant.

The jurisprudence of this Nation and of the State of Louisiana clearly prohibits the issuance of a Search Warrant on anything less than probable cause. Additionally, a Magistrate must not accept as evidence of probable cause, unverified

Allegations of undisclosed informants whose past history of reliability has not been specifically shown or whose reports of illegal activity have not been independently verified with specific descriptions of that verification set forth in the Affidavit.

The case now before this Court presents a Search Warrant, founded, for the most part, upon suspicion. The factual allegations contained in the Affidavit emanate from a shadowy informer whose identity, reputation and factual accuracy are not shown.

In the instant case, the Louisiana Supreme Court concluded, at 378 So. 2d at 1372, that the first search of Apartment "C" (proved to be the apartment in which the "Confidential Informant" resided), eliminated that apartment as a possible repository of "a quantity of Thai Sticks (Thailand marijuana) in addition to a large amount of cocaine." Petitioner suggests to this Court that the ***fact*** that marijuana ***was found*** in Apartment "C" could well have suggested, instead, that that apartment ***may have been*** the repository of the other contraband for which the police searched. The fact that it was not in Apartment "C" when officers arrived, certainly did not mean that it had not been there previously.

The Louisiana Supreme Court, at 378 So. 2d at 1373, cited ***Jones v. United States***, 362 U.S. 257, 80 S. Ct. 725, 4 L. Ed. 2d 697 (1960) in partial support of its position. This Court is reminded that in ***Jones, Supra***, the Affidavit questioned, although containing hearsay, included a sworn statement by the Affiant that the informant had been proven reliable in the past because he had given information in the past which proved to be reliable. Additionally, the information in the ***Jones*** Affidavit which had been supplied by the informant and related by the Affiant, had also reached narcotics officers

through *independent* sources, thus corroborating the informant's contentions. In addition, in *Jones*, narcotics officers had previous admissions by the Defendant to bolster the conclusion that probable cause for the search existed.

Similarly, in *Bastida v. Henderson*, 487 F.2d 860 (1973), cited by the Louisiana Supreme Court, the Affidavit in question contained detailed information from an informant who had a past history of proven reliability. *All* of the pertinent information has been revealed to the issuing Magistrate in that case, as opposed to the situation in the instant case when officers, seeking a warrant, apparently intentionally withheld from the issuing Magistrate extremely pertinent information concerning their "confidential source", etc.

The Louisiana Supreme Court at 378 So. 2d at 1373 also relied upon *Ventresca v. United States*, 380 U.S. 102, 85 S. Ct. 741, 13 L. Ed. 2d 684 (1965). In that decision, however, the Search Warrant and the Affidavit in support thereof were upheld because this Court emphasized at 380 U.S. at 109, that the Affidavit: (A) Must contain a recital of underlying circumstances, and (B) must articulate the reasons given for crediting the source of the information as reliable. In addition, in *Ventresca*, many of the facts recited in the Affidavit were, in truth, direct observations made by the Affiant and other government agents, The *Ventresca* factual situation, therefore, is in complete opposition to the instant case in which ***all*** pertinent "facts" came from a shadowy "Confidential Informant", with no proven reliability and no disclosure of identity.

2. This Court should grant Certiorari to consider whether rights protected by the Fourth Amendment to the United States Constitution were violated by law Enforcement Officers when they apparently embarked upon a search of each apartment within a three-apartment structure until suspected contraband was found in Petitioner's apartment.

The references to the record given in preceding paragraphs of this Application reveal that the officers, prior to a search of the "Confidential Informant's"apartment, did not know from which of the three apartments, or indeed elsewhere in the apartment building, the contraband delivered to them by Mr. "Torres" had come. After the search of the informant's apartment (which search was carefully hidden from the knowledge of the Magistrate,) they had nothing more then suspicion that the source of the contraband was Petitioner's apartment. In fact as the Louisiana Supreme Court admitted (378 So. 2d at 1373), "only the fact that Apartment B had not been checked out as a repository of drugs remained to establish with certainty that Apartment A was the repository". Thus, it is apparent that police officers, not knowing which residence contained contraband, set out to search every residence in the building until it was found. It is suggested to this Court that such an approach is no different from that of police officers who suspect illicit activity and substances in a city block, setting out upon a house to house search of every residence in the block until the contraband is found. Such tactics cannot be condoned by the Fourth Amendment to the United States Constitution.

In this case, the Louisiana Supreme Court (378 So. 2d at 1373) attempted to deny the apartment by apartment search embarked upon by Law Enforcement Officers by suggesting that "the issuing Magistrate's finding of probable cause is also well-founded because the information received from the Confidential Informant that Dazet lived in Apartment A and dealt in narcotics there was verified and considered reliable when investigators ascertained that Dazet lived in Apartment A, he was on probation as a result of a conviction for distributing marijuana, and he had also been arrested several times in the past". As a matter of fact, however, the record, as indicated elsewhere in this Application, reveals that the officers in question did not know that Dazet lived in Apartment "A"

and they certainly did not independently corroborate the allegation attributed to the Confidential Informant concerning Dazet's living in Apartment "A", dealing in narcotics there, etc. Of even more vital importance however, is the fact that much of that information was not disclosed to the Magistrate.

It should be especially noted that police officers who sought a warrant to search Apartment "A" of 1525 Aztec Street studiously avoided revealing to the issuing Magistrate their previous night's activities. They apparently did not wish that the Magistrate know that they had obtained one warrant which failed to produce what they sought. They apparently did not wish that the Magistrate be apprised of the fact that the "information" which they were supposedly presenting to him was, in reality, the result of a frantic attempt on the part of an individual (Thomas Lee) whom officers had found to be in possession of contraband, to avoid the serious consequences of that illegal act. It should be remembered that those cases in which Courts have placed greater emphasis on the information supplied by a person under arrest, usually involve the arrest of a person ***directly involved*** in illegal activity with the person whose premises were sought to be searched. In the case before this Court, there is no contention that Lee was involved with the occupants of Apartment"A", which officers were seeking to search. Thus, an issuing Magistrate who had been fully apprised of all of the facts and circumstances surrounding the "Confidential Informant's" revelations, could well have concluded that those "revelations" were not worthy of great trust, in view of the panicky attempt by the individual to extricate himself from the clutches of the police.

3. This Court should grant Certiorari to consider whether the failure of Affiant Law Enforcement Officers to disclose to the issuing Magistrate pertinent facts concerning police activity in prior searches of apartments in the building in which Petitioner's apartment was located and the totally false ***factual*** conclusions reached

by the Louisiana Supreme Court to the effect that these facts *were* presented in the Affidavit violated Petitioner's Fourth Amendment Rights.

In the case at bar, the Louisiana Supreme Court (378 So. 2d at 1373) made the following vitally important statement in its reasoning upholding the questionable search:

> In addition, the Affidavit does state that a Search Warrant was executed on Lee's apartment and the confidential informant was arrested by Jefferson Parish Sheriff's Office, Narcotic Division Agents within Twenty-four hours prior to the seizure in Dazet's appartment. The fact of the informant's arrest by the agents and that he was not a mere 'tipster' creates an even stronger presumption of reliability. *United States v. Harris*, 403 U.S. 573, 91 S. Ct. 2075, 29 L. Ed. 2d 723 (1971). That factual conclusion by the Louisiana Supreme Court is totally in error.

A reading of the Affidavit given in support of the Search Warrant in question as it appears in the Transcript at Pages 43 and 40 will reveal that it does not contain anywhere therein a revelation of the fact that a Search Warrant had been previously executed on Lee's (the Confidential Informant's) apartment and that the Confidential Informant had been arrested Jefferson Parish Sheriff's Office Narcotics Division Agents within twenty-four hours prior to the seizure in Petitioner's apartment. Those revelations are simply not present in the Affidavit and the statement by the Louisiana Supreme Court that they *are* present is wrong. It is clear, therefore, that the issuing Magistrate did not know about the prior search of informant Lee's apartment and did not know that informant Lee had been arrested within twenty-four hours prior to the search of Petitioner's apartment. Since the Louisiana Supreme Court apparently relied heavily upon that conclusion in reaching its decision, it is suggested that Petitioner's rights as pro-

tected by the Fourth Amendment to the United States Constitution have been flagrantly violated because the decision of the highest Court of the State of Louisiana has been based upon a wholly false premise.

CONCLUSION

Petitioner prays that this Court grant the Writ requested herein so that a clear and proper determination may be reached by this Court for the assistance of Courts throughout this Nation in determining the extent of reliance which may be placed upon allegations of an unidentified Confidential Informant. Additionally, it is suggested that this Court should accept the Application made herein for a vital determination as to the extent of permissible police activity in conducting *de facto* systematic searches of residences in proximity to one another in an attempt to locate contraband. Petitioner prays that this Application for a Writ of Certiorari be granted, therefore, and that a full review of the Judgment of the Supreme Court of the State of Louisiana be conducted.

Respectfully submitted,

GRISBAUM & KLEPPNER

BY:_____

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CERTIFICATE OF SERVICE

I, Ferdinand J. Kleppner, an attorney for Petitioner do hereby certify that I have served copies of this Brief to all interested parties. on this the 26 day of June , 1980.

Ferdinand J. Kleppner

APPENDIX "A"

IN THE 24th Judicial COURT JPSO ITEM #___
PARISH OF JEFFERSON
STATE OF LOUISIANA

APPLICATION FOR AND SWORN PROOF OF PROBABLE CAUSE FOR THE ISSUANCE OF A SEARCH WARRANT HEREIN

PERSONALLY CAME AND APPEARED BEFORE ME, the undersigned Judge of the 24th Judicial Court, Parish of Jefferson, State of Louisiana, Agent J. Nelson of the Jefferson Parish Sheriff's Office, who, upon being duly by me sworn, depose(s) and say(s):

THAT A SEARCH WARRANT SHOULD BE ISSUED FOR THE SEARCH OF the premises bearing the municipal numbers 1525 Aztec Apartment A Metairie, La. Said premises being a three story multi-dwelling apartment complex being constructed of red brick trimmed in white with white numbers and a slooped roof FOR THE FOLLOWING REASONS:

On the 1st of April 1977 while working on illegal drug traffickers located on the east bank of Jefferson Parish in an undercover capacity Agt. G. Grannan had occassion to meet with a subject known to him as Frank Torres. Torres informed Agt. Grannan that a friend of his was in possession of a large quantity of Cocaine and Marijuana and that he could sell Agt. Grannan any amount that he wanted. Agt. Grannan at this time made arrangements to meet Torres at the parking lot of Kalebs Lounge at approximately 6:00 pm that date. Agt. Grannan informed Agt. J. Nelson of this conversation and arrangements were made for Agt. Grannan to give $450.00 in recorded bills to Torres at this

location and for Agts. to follow Torres to his source of supply. The following is a list of the money used by Agt. Grannan; eight twenty dollar bills serial numbers F26242796B, G74272467D, F15185620B, F25203252B, F01199738, K95086176A, F245 718B, B85579508E, and also twenty-nine ten dollar bills with the following serial numbers, F80591816B, F07324499, F5519310 CG4346863, H72242730A, F58094674A,E73163632B F68819067B, F69842655B, H9361786, F06657828, F58639604A, F99008974A, J75810213A,F575055B6B, C95907465B, B20939931H, B34517039H, F57293652A, F57622939B, F61574248B, H84740552A, F607934953 F80582487B, F58713343A and two other bills which were not readable.

At approximately 6:00pm Agts. Nelson, Soto, Renton, Whitehead, Accardo, Steckler, and Sgt. E. Reider set us a surveillance of the parking lot in question. At approx. 6:10pm Agent Grannan met with Torres and gave him eht money in question. Torres informed Agt. Grannan that he was going to his source and that we hould meet him at 6:45pm at the same location with the drugs. Agt. Grannan agreed and Torres departed the area in a 1975 Pontiac Grand Prix with no license plate on the vehicle. Agents on surveillance followed the vehicle in question and observed it to proceed directly to 1525 Aztec St. Metairie, La. where the driver of the vehicle exited his vehicle and entered the building. At approximately 7:05pm same date Agents observed Torres to exit the residence in question and to enter his vehicle. Torres was followed directly to Kalebs parking lot where he met with and sold Agt. Grannan 1/4 ounce of cocaine. Torres informed Agt. Grannan that his

J. Nelson /s/
JEFFERSON PARISH
SHERIFF'S OFFICE

SWORN TO AND SUBSCRIBED BEFORE ME
THIS 2nd DAY OF
April 1977.

Patrick E. Carr /s/
J U D G E:
PARISH OF JEFFERSON
STATE OF LOUISIANA

COPIES:
1-Judge Signing
1-District Attorney
1-Criminal Records Room
1-Officer Case File

IN THE 24th Judicial COURT JPSO ITEM #_____
PARISH OF JEFFERSON
STATE OF LOUISIANA

APPLICATION FOR AND SWORN PROOF OF PROBABLE CASUE FOR THE ISSUANCE OF A SEARCH WARRANT HEREIN

PERSONALLY CAME AND APPEARED BEFORE ME, the undersigned Judge of the 24th Judicial Court, Parish of Jefferson, State of Louisiana, Agent J. Nelson of the Jefferson Parish Sheriff's Office, who, upon being duly by me sworn, depose(s) and say(s):

THAT A SEARCH WARRANT SHOULD BE ISSUED FOR THE SEARCH OF OF _____
Description same as page 1
FOR THE FOLLOWING REASONS:

connection was running a little late and he had to wait for him. Torres also informed Grannan that his connection had a quantity of Thai-Sticks (Thailand Marijuana) in addition to a large amount of cocaine. Agt. Grannan then departed company with Torres.

Agents then began an investigation into the activity of the occupant of 1525 Aztec Atp. A and after checking with a confidential source learned that this apartment is occupied by Dorothy Gardner w/f and is frequently additionaly occupied by a subject by the name of James Dazet. Agents checked with JPSO Records Section and learned that the subject Gardner has no record with this department but that the subject James Dazet has been arrested in the past for five

felony offences and is currently on probation until 1979 for a conviction for distribution of Marijuana. Dazet is described as a white male DOB 1-19-52 6'0", 180 lbs. brown hair and hazel eyes and is JPSO B of I number 55353 as well as NOPD B of I number 170264.

On the 2nd of April 1977 Agt. Nelson checked with Agt. Renton of the JPSO Narcotics Division and learned that he Renton had a reliable confidential informant whose information has been proven reliable through independant investigation, who was familiar with the activity in apartment A of 1525 Aztec. The CI had stated to Agt. Renton that on numerous occasions while inside the apartment with the most recent visit to the apartment being on the evening of the 1st of April 1977. The CI further stated that on several occasions that he had purchased drugs from James Dazet in that apartment but that he did not wish to purchase any drugs from Dazet for evidence purposes because he feared for his own safety and well being as well as that of his family.

Based on the aforementioned facts and information it is respectfully requested that a search warrant be issued for this residence and that said warrant be extended to include daytime, nighttime, Sunday and holiday searches.

J. Nelson /s/
JEFFERSON PARISH
SHERIFF'S OFFICE

SWORN TO AND SUBSCRIBED BEFORE ME THIS 2nd DAY OF April 1977.

Patrick E. Carr /s/
J U D G E:
PARISH OF JEFFERSON
STATE OF LOUISIANA

COPIES:
1-Judge Signing
1-District Attorney
1-Criminal Records Room
1-Officer Case File

[8] . . . Q. Now, at the time isn't it a fact that none of the surveillance officers including yourself knew what apartment Torres went into?

A. That is correct, sir.

Q. Did you state under oath in your affidavit to Judge Carr that an Agent Renton had given you certain information that he derived from a quote "reliable informer" On April 2, 1977, about occupant of apartment"A" of 1525 Aztec?

A. Yes, sir.

Q. That was the day or was that the day after you had obtained the first warrant?

A. Yes, sir.

Q. To back up a moment, was that first warrant executed on April 1, 1977?

A I believe so, yes, sir.

Q. It was on April 2, 1977, then is that correct that Agent Renton told you about this confidential informer?

A. Yes.

Q. Now, this confidential informer, according to your affidavit and I will ask you if this is correct, had no previous history of reliability, did he?

A. I don't know, sir.

Q. You made this affidavit, didn't you, sir?

A. Yes, sir.

Q. In fact, to correct the record, I will show this witness the document which purports to be an affidavit - - application for and sworn proof of probable cause for the issuance of a search warrant consist-[9] ing of two pages for what appears to be the signature of J. Nelson and also the signature of Patrick E. Carr and I will ask you if you can identify it?

A. It is an application to Judge Carr which he signed for me.

Q. Is that your signature in the lower left hand corner of both of those pages?

A. Yes.

Q. I will ask you now Mr. Nelson to refer to the second paragraph on page two of that application and read the first sentence of it and ask you if that is the information that you vonveyed to Judge Carr?

A. " On the second of April 1977, Agent Nelson checked with Agent Renton of the JPSO Narcotics Division and learned that he, Renton had a reliable confidential informer whose information had proven reliable through independ-

dent investigation. Who is familiar with the activity in "A" of of 1525 Aztec."

Q. Did you at a -- at time -- at that time learn from Agent Renton of the name of that "realiable confidential informmer?"

A. I don't know if I learned at that time or not, sir.

Q. Was that name Tom Lee?

A. Yes, sir.

Q. Was that the same Tom Lee that -- Whose apartment you had searched the previous night?

A. Yes, sir. [10]

[10] BY THE COURT:

Alright, since you know the name of the confidential informer the Court grants you your motion to use the same. We can dispose of that right now because you have him supoenaed.

BY MR. KLEPPNER:

If I could ask one more thing before the Court rules, your Honor.

Q. Was there any other confidential informer involved in the issuance of this warrant?

A. In the issuance of that warrant?

Q. Yes?

A. No, sir.

BY THE COURT:

Alright, relative to your request for the name of the confidential informer since you already know it the Court grants your motion and you have the information.

BY MR. KLEPPNER:

Thank you, Your Honor.

BY THE COURT:

You are satisfied?

BY MR. KLEPPNER:

I am satisfied, your Honor.

Q. Mr. Nelson, did or is it a fact then or can you tell me yes or no, did this confidential informant, Mr. Lee, make his statement to Agent Renton after the search that was conducted of his apartment at 1525 Aztec?

[11] A. Yes, sir.

Q. Was it also after you had charged him with a possession of marijuana?

A. Yes, sir.

Q. Referring to the two page affidavit which you identified a moment ago and

again directing your attention to page two the second paragraph, I would ask you to read aloud the balance starting with the second sentence to the end of that paragraph?

A. "The CI stated to Agent Renton that on numerous occasions which -- while inside of apartment "A" of 1524 I mean 1525 Aztec he had observed large amounts of marijuana and cocaine inside of the apartment. The most recent visit being on the evening of the first of April 1977. The CI further stated that on several occasions he had purchased drugs from James Dazet in that apartment, but that he did not wish to purchase any drugs from Dazet for evidence purposes because he feared for his own safety and well being as well as that of his family."

Q. Were you present when that statement was allegedly made by Mr. Lee?

A. I was present when Mr. Lee was being questioned, but I don't recall the totality of his conversation.

Q. Do you recall the substance of that conversation of that statement being made?

A. More or less, yes, sir.

Q. Is it correct then that your statement in the affidavit on page two that this information was supplied to you by Agent Renton was supplemented by your own Personal presence when the statement was made by confidential informer,

[12] is that correct?

A. My personal presence was that of in and out. So, I was not totally aware of everything that was said, so I had to go and rely on what Agent Renton told me.

Q. This was, am I correct, during the course of this raid which was conducted on the 1st of April on Mr. Lee's apartment, is that correct?

A. No, sir.

Q. When was it made?

A. This was afterwards.

Q. Was it immediately afterwards?

A. Yes, sir.

Q. The same night?

A. The same night.

Q. In his apartment?

A. I believe he made statements in his apartment as well as at the First District.

Q. What did you promise Mr. Lee in return for his cooperation?

A. I did no promise Mr. Lee anything.

Q. What did any other agent promise Mr. Lee in return for his cooperation?

A. I can't speak for anybody else.

Q. Do you have direct knowledge of anything promised to Mr. In return for his statements?

A. No, sir.

[13] Q. Do you have any indirect knowledge for anything promised to Mr. Lee for his statments?

A. No, sir.

Q. Mr. Nelson, were there any other apartment letters designating or designations of numbers on the outside of the building at 1525 Aztec?

A. No, sir. I don't believe so.

Q. You knew when you were conducting the surveillance prior to the issuance of the warrant that the building had three apartments in it, didn"t you?

A. Yes, sir.

Q. Did you get a warrant for the third apartment in a similar way as the way you got one for the first two?

A I --

Q. As I understand your testimony you got a warrant for apartment "A" and a warrant for apartment "C", did you get one for apartment "B" also?

A. No, sir.

Q. You did not?

A. No, sir.

I have no further questions at this time your Honor.

DIRECT EXAMINATION:

BY MR. AMATO:

Q. Let me ask you something officer, after talking to Mr. Lee, did you all substantiantiate or check or whatever any of the information in what he gave you?

A. A check was made of the subject, James Dazet.

. . . .

[15] Q. What did he surveillance units do with Torres?

A. Followed him from 18th Street or Fat City Avenue to 1525 Azetc.

Q. This would be the address or resident or apartment building that Mr. Dazet lives in, is that correct?

A. Yes, sir.

Q. Did your search warrant provide for searching for money that was used for the buy with Torres?

A. Yes, sir. It did.

Q. Was this money subsequently or some of the money subsequently found?

A. Yes, sir. It was.

[15] [19]

Q. Where was it found, Officer?

A. On Mr. Dazet.

Q. On Mr. Dazet?

A. Yes, sir.

I have no further questions, Your Honor.

RECROSS EXAMINATION:

BY MR. KLEPPNER:

Q. Mr. Nelson, the apartment in which the search that is the subject of this Motion to Suppress this morning, where it was conducted, whose name is that in?

A. I believe the name is Gardner.

Q. It wasn't the name of James Dazet, was it?

A. No, it was not.

Q. And when the surveillance team followed Torres to this apartment building they did not determine which apartment he went into did they?

A No, sir.

[19] Q. Was it given to you in the course of your arrest of that confidential informer?

A. I would rather not answer that.

[19] BY MR. KLEPPNER:

Your Honor, I will ask that you instruct the witness to answer.

BY THE COURT:

The name of the confidential informer has already been divulged and accordingly, the Court is going to order you to answer the question.

A. That is correct.

Q. Is that when that information was given to you?

A. That is correct.

Q. Was he in handcuffs?

A. No, he was not.

Q. Was that Mr. Lee?

A. Yes, it was.

Q. Tom Lee, is that right?

A. That is correct.

Q. Had you ever used Mr. Lee as an informant at anytime before that?

A. Before what.

Q. Before the evening of April 1st?

A. No, I hadn't.

[19] Q. Did anybody else who was working on this case ever use him?

A. Not to my knowledge.

Q. What anything was promised to Mr. Lee with regard to his charges that were filed against him in return for the statement he made to you?

[20] A. In order to answer that a set of circumstances has to be explained. If you would like me to go into that.

Q. I would like you to answer the question and then I am sure the Judge will permit you to explain?

A. When he gave that information to us I don't believe anything was promised to him. But, during the course of the information the only promise that was made to him was that his wife would not be arrested. I would like to explain that to the Court.

BY THE COURT:

Explain it.

BY THE WITNESS:

On the night of April 1st, as you know with the affidavit the purchase occurred with the man, the undercover man at the apartment and whatever. We had information previous to this purchase that Tom Lee was living in that complex and this information was given to us by someone completely different from

[20] the person we are speaking of now. This is another informer. That Tom Lee was dealing in some cocaine. Based on this information and other information we obtained a search warrant for that residence. We executed the search warrant. We were specifically looking for a sum of money that was supplied by the under cover agent to buy -- I mean to a guy who purchased the drugs or sold the drugs to the under cover agent. A man by the [21] name of Frank Torres. We went to the apartment looking for the cocaine and marijuana and also for this money. When we went there we did not find the money and it was quite evident to us that we were wrong with this investigation. That Tom Lee did not in fact sell these drugs to Mr. Torres. We also questioned Mr. Lee after finding a small amount of marijuana. We questioned Mr. Lee about his having any knowledge of any cocaine on his premises or him distributing cocaine. At that point he admitted to us that he had in the past sold cocaine and that he did not sell cocaine this day. We told him that we were aware that there definitely was someone who was in this building who had supplied cocaine to Mr. Torres who had in turn sold it to Agent Gannon of the Narcotics Division. At that point he told us that James Dazet lived down stairs in apartment "I". We talked about a lot of things that night and he also was told that if he cooperated with us in this investigation that his wife would not be arrested.

[21] Q. Mr. Renton, there were three apartments at 1525 Aztec?

A. That is correct.

Q. When Torres went into this apartment building you did not know what apartment he went into, did you?

A. The building is a three story building and very small around the bottom. It is just a . . .

[23] BY THE COURT:

Objection sustained.

Q. Whose name was apartment "A" which is the subject of the search before the Court today, whose name was that apartment in?

A. See, that is where a lot of problems come in. We, we, with the Federal Privacy Act we no longer have access to certain records that we had before. We were not able to determine that. We have a criss-cross directory which is more or less a telephone book for addresses. Apartment "A" in the criss-cross directory is listed as being the resident or residence of Thomas Lee. In fact it is not because Thomas Lee lives in Apartment "C". We determined after the arrest of Mr. Dazet and Miss Urquahart another girl, I don't remember her name as this time owned that apartment and had lent it -- Mr. Dazet told me that he ---.

BY MR. KLEPPNER:

Objection to any statements by the accused. I merely asked him whose apartment it was.

BY THE COURT:

Of, course he has answered and the objection is overruled.

Q. What was your answer?

A. Mr. Dazet told me that he was using the apartment with Miss Urquahart while the other lady was the leasee or whether of the apartments was out of town.

[24] A. Who was the lady?

A. I forget her name. It was another girl. I think her name was Dorothy Garner, possibly.

Q. Is it a fact Mr. Renton, that the affidavit was given for the search of the upstairs apartment which you arrested Mr. Lee was the same as the one that was given for the search for apartment "A"? With the acception of the portion dealing with your description of a confidential informer was left out?

A. No, I don't think that is correct.

Q. Was the money described in the affidavit?

A. Sure.

Q. Was the information, well, let me ask

you this, have you seen the affidavit which was given for the search of apartment "A"?

A. The whole thing the whole first page of the affidavit is entirely the same.

Q. It is?

A. Yes.

I have no further questions your Honor.

DIRECT EXAMINATION:

BY MR. AMATO:

Q. Let me ask you something, Officer. Mr. Lee gave you other information other than just about Mr. Dazet?

A. Right.

Q. Prior to having presented this warrant to a Judge for a signature, did you verify the other information that Mr. Lee gave? . . .

* * *

[26] telling us anything about Mr. Dazet as he was or had told us that he was afraid Mr. Dazet would have him killed. He was very, very scared of this and I am sure you will find this out when he gets on the stand.

Q. The information that he gave you did this prove to be true?

[26] [28]

BY MR. KLEPPNER:

Your Honor, I am going to object to that question. It is to vague and general. What information.

Q. Let me ask you this, the information that he gave you about Mr. Dazet, did it prove to be true?

A. Yes.

BY MR. KLEPPNER:

Your Honor, I am going to object to that question. I again suggest that when he says "information" that is too general. We are dealing here with a warrant and the only information that is specified in that warrant has to do with a specific activity in a specific apartment. Anything beyond that is not only irrelevant, but the question is vague and general. He could be talking about anything.

Q. Let me ask you specific questions about Mr. Dazet.

Did he tell you ---

BY MR. KLEPPNER:

I object to that question it goes beyond the scope of this affidavit.

* * *

[28] Objection overruled.

A. Yes, it did.

Q. In fact when you executed the search warrant someone was there, is that correct?

A. Yes, it is.

Q. Now, while -- with regards to information he gave you as to other people, what type information did he give you?

A. ----

BY MR. KLEPPNER:

Objection your Honor. It goes beyond the scope of the affidavit.

BY THE COURT:

It is going to the question of the reliability of the CI. Objection overruled.

BY MR. KLEPPNER:

Your Honor, if I could only point out that the statement in the affidavit is that "the reliable confidential informer whose information has been proven reliable through independent investigation" which would indicate that the information he gave them about Mr. Dazet.

BY THE COURT:

That is not what he said. Objection overruled.

[28] [30]

Q. Did he give you other information?

A. Yes, he did.

Q. Did he give you information about who is buying and who is selling narcotics in Jefferson Parish?

BY MR. KLEPPNER:

Objection your Honor. It goes beyond . . .

[30] A. Excuse me, sir, I ---

Q. You had never obtained any information for the purpose of obtaining warrants or conducting searches from Mr. Lee that you used in that course prior to your having obtained the information you did for this one?

A. This was the first information he gave us that was used in an affidavit form.

I have no further questions, your Honor.

BY THE COURT:

Any other questions.

BY MR. AMATO:

No, your Honor.

BY THE COURT:

Agent, remain outside and don't discuss your testimony with anyone else.

[30] [31]

Next witness.

BY MR. KLEPPNER:

Mr. Lee.

THOMAS C. LEE, 1525 Aztec, Apartment C, Metairie, Louisiana was called as a witness and after having been first duly sworn, was examined and testified on his oath as follows:

CROSS EXAMINATION:

BY MR. KLEPPNER:

Q. Where do you live, Mr. Lee?

A. 1525 Aztec, Apartment C, Metairie, Louisiana.

Q. Mr. Lee, do you recall or did in fact a search of your apartment occur by the members of the Narcotic Squad of the Jefferson Parish Sheriff's Office on the first of April, 1977?

[31] A. Yes, sir.

Q. Did the officers who presented themselves have a warrant?

A. Yes, sir, they did.

Q. Was Agent Renton one of those?

A. Yes, he was.

Q. Did Mr. Renton conduct any questioning of you after he searched your apartment?

A. Yes, he did.

Q. Did he find anything in your apartment shich was countraband such as marijuana?

A. Yes.

Q. Following the finding of this substance did he then question you?

A. Yes.

Q. Had you ever met Agent Renton before that time?

A. Yes, I knew him. I had gone to high school with him.

Q. Had you ever furnished information for him as an informant in the past?

A. No.

Q. Did you tell Agent Renton on April one 1977 that you had seen large amounts of marijuana and cocaine in apartment "A" at 1525 Aztec on numerous occasions?

A. No, sir. Not to my recollection.

Q. Did you not him that?

A. No.

Q. Did you tell him that on several occasions you had purchased drugs from James Dazet at apartment "A" at 1525 Aztec?

A. No. I did not tell that to him.

Q. Have you been threatened in anyway by Mr. Dazet?

[32] A. No. I have not.

Q. Has your life been threatened?

A. No.

Q. Has he suggested to you that he would do anything to harm you?

A. No.

Q. Did he make any statements to you about DEA files having seen your name in them?

A. He had mentioned that he had seen files but there was no mention that my name was in it.

Q. Are you testifying here today because of any fear of Mr. Dazet at all?

A. No, I am testifying here because I was subpoenaed as a witness.

Q. Now, where or were you charged with a crime after the search of your apartment?

A. Yes, I was charged with possession of marijuana.

Q. Was any proposal made to you by any of the Agents inluding but limited to Agent Renton, this was concerning the charges that were against you if you gave statements about anybody else?

A. No, they did not make any deals with me.

Q. Did they make any suggestions to you as to what they might do?

A No, they did not.

Q. Did they offer not to charge your wife?

A. Yes, they did.

I have no further questions your Honor.

DIRECT EXAMINATION:

BY MR. AMATO:

Q. Let me ask you something Mr. Lee, how long did you talk to Agent Renton, that night?

* * * *

[34] weed with Mr. Dazet?

A. No.

Q. Did you tell him that you purchased drugs from Mr. Dazet?

A. No.

Q. You never told him that you purchased drugs from Mr. Dazet?

A. No.

BY THE COURT:

Did you tell him that you had gotten

marijuana from Mr. Dazet?

BY THE WITNESS:

No, sir. I did not.

Q. Did you tell him about other people other than Mr. Dazet?

A. No, sir. I did not.

Q. You didn't tell him about anybody else but Dazet?

A. He also asked me about the people who lived on the second floor and I gave him a brief run down about what I knew about those people, but that is all.

Q. Did you tell him that you went to his apartment during the day of April the 1st?

BY MR. KLEPPNER:

Your Honor, I am going to ask him which apartment.

BY MR. AMATO:

Dazet's apartment.

A. Apartment "A". Yes, I believe I did tell him that I was at Dazet's apartment.

Q. That you had seen marijuana that time or that day?

A. Right.

APPENDIX "B"

STATE of Louisiana

v.

James Dazet.

No. 64566.

Supreme Court of Louisiana
Dec. 13, 1979
Rehearing Denied Jan. 28, 1980

After pleading guilty to possession of cocaine with intent to distribute, defendant was sentenced by the Twenty-Fourth Judicial District court, Parish of Jefferson, Nestor L. Currault, J., to imprisonment at hard labor for five years and he appealed. The Supreme Court, Summers, C.J., held that: (1) affidavit submitted to support search warrant was based upon reliable information, and (2) sentence was not excessive or cruel and unusual punishment in derogation of defendant's rights.

Affirmed.

1. Drugs and Narcotics Key 188

Reliability of information furnished by confidential informant concerning defendant's possession and distribution of drugs was sufficient to support affidavit submitted in support of search warrant, even though informant repudiated much of that information at trial, where details of events leading to drug transaction took place in plain view of narcotics agents and established that contraband drugs were located in one of three apartments and informant's information that defendant lived in one of the apartments and dealt in narcotics was independently verified.

2. Searches and Seizures Key 3.6(2)

A magistrate needs only a substantial basis to determine that evidence was probably located where informant said it was; only reasonable probabilities are required to support issuance of warrant. U.S.C.A. Const. Amend. 4.

3. Criminal Law Key 1213

Drugs and Narcotics Key 133

Sentence of five years imposed on defendant who, relying on plea bargain, tendered plea of guilty to possession of cocaine with intent to distribute, was not excessive or cruel and unusual punishment in derogation of defendant's rights as sentence was minimum permissible in such cases. LSA - R. S. 40:967.

4. Criminal Law Key 5

Legislature's authority in fixing sentences is plenary and its determinations on punishment for crime is vested with a presumption of constitutionality.

Ferdinand J. Kleppner, Grisbaum & Kleppner, Metairie, for defendant-appellant.

William J. Guste, Jr., Atty. Gen., Barbara Rutledge, Asst. Atty. Gen., John M. Mamoulides, Dist. Atty., Abbott J. Reeves, Jacob J. Amato, Jr., Asst. Dist. Attys., Gretna, for plaintiff-appellee.

SUMMERS, Chief Justice.*

Defendant James Dazet was charged by bill of information in two counts with possession of marijuana with intent to distribute and that he did knowingly and intentionally possess cocaine with intent to distribute, violations of La. Rev. Stat. 40:966 and 40:967, respectively. Dazet initially pled not guilty and filed a motion to suppress the evidence, which was denied. Relying on a plea bargain he then withdrew his guilty plea and tendered a plea of guilty to possession of cocaine with intent to distribute on the condition that he retain the right to contest the trial judge's adverse ruling on the motion to suppress. With this understanding the charge of possession of marijuana was dismissed. After ascertaining that Dazet's plea was free and voluntary, the trial judge sentenced him to imprisonment at hard labor for five years. On this appeal defendant contends that 1) the trial judge erred in denying his motion to supress the evidence, and 2) the sentence of five years was excessive.

Assignment 1: Here the defense claims the trial judge committed reversible error by refusing to grant defendant's motion to suppress evidence alleged to have been illegally seized as a result of an unconstitutional search of defendant's apartment. The gravamen of this motion rests in the allegation that the affidavit submitted to support the search warrant was based upon information furnished by a confidential informant without setting forth facts to establish the reliability of the informant; consequently the accuracy of the information furnished by the informant was also in question.

The contested affidavit set forth that on April 1, 1977, while working in illegal drug traffic on the east bank of Jefferson Parish in an undercover capacity, Agent Grannan met Frank

* The Honorable Paul B. Landry served as Justice ad hoc in this case.

Torres. Torres stated that a friend of his had a large quantity of cocaine and marijuana and that he could sell Grannan any amount he wanted. It was then arranged that Grannan would meet Torres at the parking lot of Kaleb's lounge at approximately six o'clock that night.

Grannan conveyed this information to Agent J. Nelson, who made arrangements for Gannan to give $450 in recorded bills to Torres at the rendezvous. Other agents would then follow Torres to his source of supply.

At six o'clock that night seven narcotic agents established a surveillance of the parking lot. Shortly thereafter Grannan met Torres and gave him the money, and Torres told Grannan he was going to his source and would meet Grannan at 6:45 at the same location with the drugs. Accordingly Torres departed in a 1975 Pontiac Grand Prix with no license plate.

Agents on surveillance followed the vehicle as it proceeded to 1525 Aztec Street in Metairie, Louiaiana, where the driver left the vehicle and entered the building. At approximately 7:05 Torres was seen to leave the apartment, enter his vehicle, and proceed to Kaleb's parking lot. There he met Grannan and sold him one-quarter ounce of cocaine, after which Torres informed Grannan that his "connection" had a quantity of Thai-Sticks (Thailand Marijuana) in addition to large amounts of cocaine. They then parted company.

Shortly thereafter narcotic agents began an investigation into the activity of the occupant of Apartment A at the 1525 Aztec Street address. They learned from a confidential source that this apartment was occupied by Dorothy Gardner, a white female, and was frequented by James Dazet. Agents then checked the Jefferson Parish Sheriff's Office Record Section. That source disclosed that Dazet had been arrested in the past for five felony offenses and was then on probation until 1979 as a result of a conviction for distribution of marijuana.

The next day, April 2, 1977, Agent Nelson ascertained from Agent Renton of the Jefferson Parish Sheriff's Office Narcotics Division that Renton had a reliable confidential informant whose information had been proven reliable through independent investigation, who was familiar with the activity in Apartment A of the apartment house at 1525 Aztec Street. The confidential informant had stated to Renton that on numerous occasions while in that apartment he had observed large amounts of marijuana and cocaine there, and his most recent visit to the apartment was the preceding evening - April 1, 1977. He further stated that on several occasions he had purchased drugs from Dazet there, but he did not wish to purchase drugs from Dazet for evidence purposes because he feared for his own safety and well-being as well as that of his family.

On this information the trial judge issued the search warrant on April 2, 1977. The search of Dazet's apartment followed. Marked bills used in the purchase by Grannan, a quantity of marijuana, cocaine and various drug paraphernalia were seized.

At a pretrial hearing on the motion to suppress, Agent Nelson of the Sheriff's Narcotic Squad was called as a defense witness. He testified that the 1525 Aztec Street address was an apartment building with a common entrance to three apartments designated respectively as A, B, and C. Previously a warrant was obtained on April 1, 1977, he said, to search apartment "C" occupied by Tom Lee. Lee, he said, was the confidential informer referred to in the affidavit supporting the warrant issued for the search of Apartment A, occupied by Defendant Dazet. Nelson was in and out of Lee's apartment when Lee informed on Dazet, but relied principally on Renton's version of Lee's statement because Renton was present at all times while Lee divulged his narcotic transactions with Dazet. Defense counsel's interrogation was designed to establish that Lee's reliability as an informer had not previously been veri-

fied. And the surveillance team which had followed Torres the previous day did not enter the apartment at that time or see which apartment Torres entered to obtain the narcotics from his "connections".

Nelson also restated the facts set forth in the affidavit concerning the check of the record on Dazet whereby it was learned that he had previously been arrested for narcotic offenses and that Dazet was then on probation for distribution of marijuana.

Thereafter Renton was called as a defense witness. He corroborated the testimony of Nelson and verified the information contained in the affidavit. Renton also said that after furnishing the information concerning Dazet, Lee called him and said that Dazet told him he had seen the Drug Enforcement Administration files which indicated that he was an informant. As a result Lee "became petrified" and had since refused to cooperate with the narcotic agents.

In Lee's testimony as a defense witness he repudiated the testimony of the agents and the information contained in the affidavit to the effect that he, the confidential informant, had purchased narcotics from Dazet and had seen large amounts of marijuana and cocaine in Apartment "A" at 1525 Aztec Street. While admitting that he had been charged with possession of marijuana, that he knew Dazet, and that the officers offered not to charge his wife, he denied that any "deal" was made to furnish law enforcement with information about Dazet. Nevertheless he did admit on cros-examination that he told the officers that someone was staying in Apartment A with Dazet, that he had been in Dazet's apartment and had seen marijuana there, while steadfastly denying that he said Dazet had sold, drugs to him. He also denied that Dazet had threatened him.

The motion to suppress was denied.

In his per curiam to this assignment the trial judge wrote:

"The affidavit stated that there existed a reliable confidential informant whose information had been proven reliable through independent investigation and who was familiar with the activity in the apartment' in question. The affidavit then recited the factual foundation for believing the informant. It seems that the language quoted above does imply that the informant had supplied reliable information in the past, but even assuming that it does not, such a statement is not necessary. The United States Supreme Court in ***United States v. Howard*** [Harris], [403 U.S. 573,] 91 S. Ct. 2075 [, 29 L. Ed. 2d 723 (1971) held that though an affidavit 'did not aver that the informant had previously given correct information, an averment of previous reliability is not essential when supported, as here, by other information.' The affidavit at hand supplied such other information by containing ample factual foundation for believing the informant.

"Secondly the defendant complains that the search was unannounced. The transcript on the hearing on the motion to suppress makes no mention of the fact that the agents did not announce their presence. But even the assumption that they have not would not invalidate the search because the defendant was with the agents at the time of the entrance and in fact opened the door from the outside for them. In addition, according to ***State v. Christiana*** [249 La. 247,] 186 So. 2d 580 (Supp. 1966), a search is still legal even though officers do not announce their presence where officers have reason to fear that the announcement would give an occupant time to dispose or to hide evidence and to escape. Here the agents kenw the defendant had a live-in girlfriend and had reason to fear a disposable of the drugs upon knocking."

We agree with the ruling of the trial judge. The reliability

of the information furnished by Lee concerning Dazet's possession and distribution of drugs is made manifest by the facts and circumstances set forth in the affidavit.

[1] While it does not appear from the affidavit that the confidential informant (Lee) has furnished reliable information in the past, details of the events leading to a drug transaction took place in plain view of the narcotic agents. Those details do supply evidence of reliability. The affidavit set forth that Torres arranged to make the sale, set up the meeting place, and asserted his "connection" had ample stocks of marijuana and cocaine. Following this disclosure he proceeded to the "source" at 1525 Aztec Street under surveillance. He entered the three-apartment building and exited with the drug, proceeded to the pearranged meeting place and sold the drug to an undercover agent, all under strict surveillance of a number of narcotic agents. One of them signed the affidavit.

These facts do establish that contraband drugs were located in one of the three apartments at 1525 Aztec Street. A search and seizure of Apartment C that very night eliminated that apartment as a possible repository of "a quantity of Thai-Sticks (Thailand Marijuana) in addition to a large amount of cocaine." Only Apartments A and B remained, therefore, as possible sources of the drugs.

On the basis of information obtained from the confidential informant, the agents began an investigation into the activity of the occupant of Apartment A. They found that Dazet was a frequent visitor at that apartment, he had been arrested in the past for five felony offenses and was currently on probation for a distribution of marijuana conviction. All of this appears in the affidavit.

While the conclusion that Dazet's apartment was the source of Torres' illicit source of narcotics, arrived at by the investigating officers, the affiant and the issuing magistrate, may not

be infallible, the conclusion is nevertheless based upon sound and reasonable probabilities. Only the fact that Apartment B had not been checked out as a repository of drugs remained to establish with certainty that Apartment A was the repository. A process of elimination requires such a conclusion. The issuing magistrate's finding of probable cause is also well-founded because the information received from the confidential informant that Dazet lived in Apartment A and dealt in narcotics there was verified and considered reliable when the investigators ascertained that Dazet lived in Apartment A, he was on probation as a result of a conviction for distributing marijuana, and he had also been arrested several times in the past.

Other support for the informant's reliability is the underlying facts he disclosed to the agents. He said Dazet had sold drugs to him and he had seen a large quantity of cocaine and marijuana in Apartment A. (Which the informant Lee later denied this in part, at the hearing the trial judge obviously did not accept the denial as credible.) In any event these underlying facts upon thich the informant based his disclosure were such that they did add reliability to his statement when the occupant of Apartment A was known by the issuing magistrate to be a convict and dope peddler.

In addition, the affidavit does state that a search warrant was executed on Lee's apartment and the confidential informant was arrested by the Jefferson Parish Sheriff's Office, Narcotic Division agents within 24 hours prior to the seizure in Dazet's apartment. The fact of the informant's arrest by the agents and that he was not a mere "tipster" creates an even stronger presumption of reliability. *United States v. Harris*, 403 U.S. 573, 91 S. Ct. 2075, 29 L. Ed. 2d 723 (1971).

[2] A magistrate needs only a substantial basis to determine that evidence was probably located where the informant said

it was, it need not be "an open and shut case," only reasonable probabilities are required to support the issuance of the warrant. ***Jones v. United States,*** 362 U.S. 257, 80 S. Ct. 725, 4 L. Ed. 2d 697 (1960). As an example, the Fifth Circuit in Bastida v. Henderson, 487 F.2d 860 (1973) approved a magistrate's warrant based on "the entire picture disclosed to him," stating that he was entitled to use common sense to support his actions.

This attitude harks back to the foundamental principles of reason enshrined in the constitution's Fourth Amendment and the decision of the United States Supreme Court in ***Ventresca v. U.S.,*** 380 U.S. 102, 85 S. Ct. 741, 13 L. Ed. 2d 684 (1965). As ***Spinelli*** observed

> ". . . in judging probable cause issuing magistrates are not to be confined by niggardly limitations or by restrictions on the use of their common sense. ***United States v. Ventresca***, 380 U.S. 102, 108, 85 S. Ct. 741, 745, [13 L. Ed. 2d 684] (1965); and that their determination of probable cause should be paid great deference by reviewing courts, ***Jones v. United States,*** 362 U.S. 257, 270 - 271, 80 S. Ct. 725, 735 - 736 [4 L. Ed. 2d 697]." ***Spinelli v. United States***, 393 U.S. 410, 89 S. Ct. 584, 591, 21 L. Ed. 2d 637.

Further, where the law enforcement officers have respected the constitutional mandate to secure a warrant before searching, although in a particular case it may not be easy to determine when an affidavit demonstrates the existence of probable cause, the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants.

The law encourages officers to go to a magistrate before a search is made if feasible, and they must not be held to the rigid technical legalities to which judges and lawyers are held in the preparation of their affidavits.

We decide, therefore, that the ruling of the trial judge was correct when he denied the motion to suppress.

[3.4] *Assignment 2:* A sentence to imprisonment to five years is not excessive or cruel and unusual punishment in derogation of a convicted defendant's rights. The legislature's authority is plenary and its determinations on punishment for crime is vested with a presumption of constitutionality. *State v. Mallery*, 364 So. 2d 1283 (La. 1978). Here the sentence did not exceed that permitted by statute; it was, to the contrary, the minimum permissible sentence in such cases. La. Rev. Stat. 40:967.

For the reasons assigned, the conviction and sentence are affirmed.

DIXON, DENNIS and CALOGERO, JJ., concur.

West Key Number System

APPENDIX "C"

SUPREME COURT OF THE UNITED STATES

NO. A-888

JAMES DAZET

Petitioner

v.

Louisiana

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon Consideration of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including June 26, 1980.

/s/ Lewis F. Powell, Jr.
Associate Justice of the Supreme
Court of the United States

Dated this 16th
day of April 19